

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 4th day of December, two thousand thirteen.

PRESENT:

JOSÉ A. CABRANES,
SUSAN L. CARNEY,
CHRISTOPHER F. DRONEY,
Circuit Judges.

JAMYANG GURUNG,
Petitioner,

v.

12-4634
NAC

ERIC H. HOLDER, JR., UNITED STATES
ATTORNEY GENERAL,
Respondent.

FOR PETITIONER: Marie Licelle R. Cobrador, Jackson Heights, New York.

FOR RESPONDENT: Stuart F. Delery, Acting Assistant Attorney General; Jennifer L. Lightbody, Senior Litigation Counsel; Laura M.L. Maroldy, Trial Attorney, Office of Immigration Litigation, United States Department of Justice, Washington, D.C.

1 UPON DUE CONSIDERATION of this petition for review of a
2 Board of Immigration Appeals ("BIA") decision, it is hereby
3 ORDERED, ADJUDGED, AND DECREED that the petition for review
4 is GRANTED in part and DENIED in part.

5 Jamyang Gurung, a native and citizen of Nepal, seeks
6 review of an October 22, 2012, decision of the BIA affirming
7 the October 15, 2010, decision of Immigration Judge ("IJ")
8 Sandy K. Hom, which pretermitted his application for asylum
9 and denied his application for withholding of removal and
10 relief under the Convention Against Torture ("CAT"). *In re*
11 *Jamyang Gurung*, No. A087 481 205 (B.I.A. Oct. 22, 2012),
12 *aff'g* No. A087 481 205 (Immig. Ct. N.Y. City Oct. 15, 2010).
13 We assume the parties' familiarity with the underlying facts
14 and procedural history in this case.

15 Because the BIA's primary basis for denying withholding
16 of removal was the IJ's adverse credibility determination,
17 though the IJ did not entirely reject Gurung's testimony and
18 denied relief only after making an additional burden
19 finding, we have reviewed the decision of the IJ as modified
20 and supplemented by the BIA. *See Yan Chen v. Gonzales*, 417
21 F.3d 268, 271 (2d Cir. 2005); *Xue Hong Yang v. U.S. Dep't of*
22 *Justice*, 426 F.3d 520, 522 (2d Cir. 2005). The applicable
23 standards of review are well-established. *See* 8 U.S.C.

1 § 1252(b)(4)(B); *see also Yanqin Weng v. Holder*, 562 F.3d
2 510, 513 (2d Cir. 2009).

3 As an initial matter, we lack jurisdiction to review
4 the pretermission of Gurung's asylum application because his
5 assertion that the agency erred in finding that he
6 established neither changed nor extraordinary circumstances
7 does not raise a reviewable constitutional claim or question
8 of law. *See* 8 U.S.C. § 1252(a)(2)(C),(D). Moreover, Gurung
9 failed to exhaust CAT relief, *see Karaj v. Gonzales*, 462
10 F.3d 113, 119 (2d Cir. 2006), so we consider only
11 withholding of removal.

12 For applications such as Gurung's, governed by the
13 amendments made to the Immigration and Nationality Act by
14 the REAL ID Act of 2005, the agency may, considering the
15 totality of the circumstances, base a credibility finding on
16 the applicant's "demeanor, candor, or responsiveness," the
17 plausibility of her account, and inconsistencies in her
18 statements, without regard to whether they go "to the heart
19 of the applicant's claim." *See* 8 U.S.C. § 1231(b)(3)(C);
20 *Xiu Xia Lin v. Mukasey*, 534 F.3d 162, 167 (2d Cir. 2008).
21 We will "defer to an IJ's credibility determination unless,
22 from the totality of the circumstances, it is plain that no

1 reasonable fact-finder could make" such a ruling. *Xiu Xia*
2 *Lin*, 534 F.3d at 167. The agency's adverse credibility
3 determination here is not supported by substantial evidence.

4 The IJ based his adverse credibility determination on
5 the following inconsistencies between Gurung's testimony and
6 asylum application: (1) Gurung's testimony that Maoists
7 visited him in 2002 and 2003 and attacked him in August
8 2004, though his application states that he was visited in
9 March 2004 and attacked in July 2004; (2) his testimony that
10 he was attacked by four or five men who he believed had a
11 sharp object or gun and hit him with a riding crop, though
12 his application states that there were six men who
13 brandished a chain knife and rope and hit him with a long
14 stick; and (3) his testimony that he was only bruised on his
15 shoulders by the stick, though his application states he was
16 hit in the face with the stick causing a nose bleed. Gurung
17 testified tentatively as to the types of weapons carried by
18 his assailants, stating twice that it was dark, that the men
19 were in a large group, and that he was hit only with the
20 long stick. However, the IJ did not consider these
21 explanations in determining whether it accounted for
22 Gurung's confusion as to the number of men and types of

1 weapons. This failure constitutes error. *See Beskovic v.*
2 *Gonzales*, 467 F.3d 223, 227 (2d Cir. 2006) (requiring a
3 certain minimal level of analysis from agency decisions
4 denying relief from removal to enable meaningful judicial
5 review).

6 Further, both the IJ and the BIA mischaracterize the
7 weapon used to hit Gurung. Although Gurung consistently
8 described the weapon as a long stick in his testimony and
9 application, the IJ described the weapon as a "riding crop"
10 and the BIA misstated Gurung's application as indicating
11 that he was hit with the chain knife. Based on this
12 misstatement, the BIA erroneously found an inconsistency
13 with Gurung's testimony that he was hit with a stick. The
14 BIA also incorrectly stated that Gurung testified that he
15 was traveling to Pokhara when stopped by the Maoists. To
16 the contrary, Gurung did not testify to his original
17 destination. Rather, both his testimony and application
18 indicate that he escaped to a neighboring village after the
19 attack and, from there, went to Pokhara.

20 Excluding consideration of these flawed findings, the
21 IJ's adverse credibility determination rested only on the
22 date discrepancies, which the IJ found were not fatal to
23 Gurung's claim, and the inconsistencies regarding the

1 injuries Gurung sustained. Because these two
2 inconsistencies do not constitute substantial evidence
3 supporting the adverse credibility determination, the agency
4 erred in denying withholding of removal on that basis. See
5 8 U.S.C. § 1231(b)(3)(C); *Xiu Xia Lin*, 534 F.3d at 167.

6 The BIA alternatively denied withholding based on
7 Gurung's failure to establish that he was targeted based on
8 a statutorily protected ground. Withholding eligibility
9 requires that the persecution an applicant suffered or fears
10 be on account of his race, religion, nationality, political
11 opinion, or particular social group. 8 U.S.C.

12 § 1231(b)(3)(A). Here, the agency considered only whether
13 Gurung established his membership in a particular social
14 group and not whether he was targeted based on his political
15 opinion due to his Nepali Congress Party activities, despite
16 his testimony and arguments on appeal that he was attacked
17 because he did not quit the party. Because the agency's
18 alternative basis for denying withholding is also erroneous
19 for failing to address Gurung's argument, see *Beskovic*, 467
20 F.3d at 227, there is a realistic possibility that, absent
21 the errors in the adverse credibility determination, the
22 agency would have reached a different conclusion. Remand
23 for reconsideration of Gurung's application for withholding

1 of removal is therefore not futile. See *Alam v. Gonzales*,
2 438 F.3d 184, 187-88 (2d Cir. 2006).

3 For the foregoing reasons, the petition for review is
4 GRANTED in part, with regard to withholding of removal, and
5 DENIED to the extent it challenges the denial of asylum and
6 CAT relief. As we have completed our review, any stay of
7 removal that the Court previously granted in this petition
8 is VACATED, and any pending motion for a stay of removal in
9 this petition is DISMISSED as moot. Any pending request for
10 oral argument in this petition is DENIED in accordance with
11 Federal Rule of Appellate Procedure 34(a)(2), and Second
12 Circuit Local Rule 34.1(b).

13 FOR THE COURT:
14 Catherine O'Hagan Wolfe, Clerk